

EXHIBIT 2

May 12, 2021 Hearing Transcript

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

TRANSCRIPT OF ZOOM HEARING
BEFORE THE HONORABLE CHRISTOPHER S. SONTCHE
CHIEF UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For RREF III Storage: Monique DiSabatino, Esquire
SAUL EWING ARNSTEIN & LEHR LLP
1201 North Market Street
Suite 2300
Wilmington, Delaware 19801

(APPEARANCES CONTINUED)

Electronically
Recorded By: Leslie Murin, ECRO

Transcription Service: Reliable
1007 N. Orange Street
Wilmington, Delaware 19801
Telephone: (302) 654-8080
E-Mail: qmatthews@reliable-co.com

Proceedings recorded by electronic sound recording:
transcript produced by transcription service.

1 APPEARANCES (CONTINUED) :2 For RREF III Storage: James Michael Peck, Esquire
3 Theresa A. Foudy, Esquire
4 MORRISON & FOERSTER LLP
5 250 West 55th Street
6 New York, New York 10019-96017 For the U.S. Trustee: Linda Richenderfer, Esquire
8 OFFICE OF THE UNITED STATES TRUSTEE
9 J. Caleb Boggs Federal Building
10 844 King Street
11 Suite 2207, Lockbox 35
12 Wilmington, Delaware 19801

13

14

15

16

17

18

19

20

21

22

23

24

25

	<u>INDEX</u>	
		<u>PAGE</u>
1		
2	<u>MATTERS GOING FORWARD:</u>	
3	Agenda	
4	Item 1: Motion for Entry of an Order Dismissing the	
5	Debtor's Chapter 11 Case with Prejudice and	
6	Granting Relief from the Automatic Stay	
7	[Date filed: 4/26/2021; D.I. 8].	
8		
9	Status Conference	4
10		
11	Court's Ruling	17
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 (Proceedings commenced at 12:01 p.m.)

2 THE COURT: Good afternoon, East Coast time. Good
3 morning, West Coast time, if anybody is coming from the West
4 Coast.

5 Mr. Peck, you were on the call five different
6 times and you look different every time. And, unfortunately,
7 I think the worst image is your original.

8 MR. PECK: I'm afraid you're right. I can also
9 stop my video, if that's more helpful.

10 THE COURT: No, no. No, no, absolutely not. It's
11 good to see you. All right.

12 MR. PECK: You as well.

13 THE COURT: I understand there's an impasse on
14 scheduling in connection with the motion to dismiss. So I
15 think the movant really prompted the call, so I'll hear from
16 them first.

17 MS. DISABATINO: Great. Your Honor, good
18 afternoon, this is Monique DiSabatino from Saul Ewing
19 Arnstein & Lehr on behalf of RREF III Storage LLC. Here
20 today is co-counsel from Morrison & Foerster, we have James
21 Peck -- we have multiple James Pecks -- sorry -- but we have
22 James Peck, Your Honor, we have Haimavath Marlier, Mark
23 Lightner, and Theresa Foudy. A motion for Ms. Foudy's
24 admission *pro hac vice* was approved earlier this week and, if
25 Your Honor would permit, I will cede the podium to her to

1 discuss the motion.

2 THE COURT: Very good, happy to do so.

3 MS. FOUDY: Thank you, Your Honor. Good
4 afternoon, Your Honor, Theresa Foudy of Morrison Foerster on
5 behalf of RREF III Storage LLC, the debtor's secured lender.

6 Your Honor, in attempting to come to a reasonable
7 schedule for a hearing on our motion to dismiss, we
8 unfortunately ran into an impasse over whether the start of
9 the hearing should be delayed in order to allow the debtor to
10 retain an appraiser, obtain an appraisal report, and conduct
11 expert discovery, and to serve discovery to both the secured
12 lender and third parties that basically seeks to re-litigate
13 issues that were already decided in the New York state court
14 foreclosure proceedings. While we realize that the
15 alternative relief we sought in our motion of seeking to lift
16 the stay does implicate value, we are also convinced, for
17 reasons that I will explain in a moment, that our motion to
18 dismiss does not and should require little, if any,
19 discovery.

20 We have thus proposed that the motion to dismiss
21 be bifurcated from the motion to lift the stay because the
22 motion -- if the motion to dismiss is granted, it will
23 obviate the need to litigate the lift-stay motion and, thus,
24 save the estate the considerable expense that would be
25 involved in the extensive discovery that the debtor has

1 served and in retaining an appraiser.

2 And saving these expenses is of no small concern
3 here. This is a debtor who has no cash on hand and whose
4 attorneys were paid by a prepetition retainer from the
5 debtor's equity holder. It is entirely unclear how the
6 administrative expenses of retaining an appraiser and paying
7 court reporters and the other inevitable expenses of a large
8 discovery effort would be funded. Thus, we believe it is
9 much preferable to potentially avoid all that unnecessary
10 expense by going forward first on the motion to dismiss.

11 Now, I know the debtor's response is to say that
12 bifurcation does not avoid any unnecessary expense because
13 all the same discovery is necessary for the motion to dismiss
14 hearing, but that is just not right, Your Honor, as a matter
15 of law. Under Third Circuit precedent, when a motion to
16 dismiss is made under Section 1112, the burden is placed upon
17 the debtor to show that it had a good faith basis for its
18 bankruptcy filing.

19 The debtor made a decision here on April 12th to
20 file a bankruptcy petition. All the information the debtor
21 needs to show was the basis it had for making that decision
22 is necessarily within the debtor's own possession, custody,
23 and control, not in the possession, custody, and control of
24 the secured lender or any other third party. An appraisal
25 that was not in existence at the time the debtor made that

1 decision could not possibly have affected that decision or
2 given the debtor a good faith basis for filing its bankruptcy
3 petition. If Nathan Paul (ph), who signed the petition,
4 wants to testify that he did so because he believes that
5 there is value, he can do so, he just needs to explain his
6 rationale and thinking at the time based on the information
7 that he possessed at the time. And whatever that information
8 was, it didn't include an appraisal that was not yet
9 conducted or discovery from third parties that had not yet
10 been produced.

11 The debtor should not need any discovery to
12 establish why it filed for bankruptcy. The debtor should
13 already know why it filed for bankruptcy and be able to prove
14 it. If the debtor did not know it had a good faith basis for
15 filing a Chapter 11 petition on April 12th without having an
16 appraisal and discovery from third parties, then the debtor
17 should not have filed the petition.

18 The debtor says that this Chapter 11 is all about
19 maximizing value and that it needs the appraisal and
20 discovery to show that there is equity value there, but the
21 mere existence or nonexistence of equity value does not
22 establish a valid bankruptcy purpose for a Chapter 11 filing.
23 The debtor has to show that it is preserving a going concern
24 or that it is adding or creating value that otherwise would
25 be unavailable to creditors outside of bankruptcy.

1 In essence, the debtor is attempting to show that
2 value is being maximized by the bankruptcy filing staying the
3 UCC foreclosure sale that was ordered by a court. The debtor
4 has served discovery that is entirely focused on the
5 foreclosure proceeding and the sales and marketing process.
6 In other words, the debtor is mounting an impermissible
7 collateral attack on the New York state court's decision
8 finding that the scheduled UCC foreclosure sale was
9 commercially reasonable and ordering it to go forward. That
10 New York state court decision was made following a court-
11 ordered, robust marketing process that the debtor agreed to,
12 and that spanned several months and resulted in eight bidders
13 being qualified to participate in the scheduled auction. If
14 the debtor had not thwarted that auction by filing a Chapter
15 11 filing, the auction would have been definitive proof of
16 value and, if the proceeds were sufficient to cover the
17 secured debt, the excess would have gone to the debtor.

18 On such facts, regardless of what the value of the
19 debtor is, there is no legitimate purpose for this
20 bankruptcy. All it does is diminish value by running up
21 administrative expenses that the debtor has no funding to
22 pay. The facts necessary for the motion to dismiss hearing
23 either are or should be undisputed, and appear to set forth a
24 paradigmatic example of what courts have found to be bad
25 faith filings.

1 The debtor is a holding company with one asset
2 that is pledged to a secured lender. There are no or few
3 other creditors. It is a two-party dispute in which the
4 debtor is seeking tactical litigation advantage to
5 collaterally attack the New York state court's decision. The
6 filing occurred within one hour of a court-ordered
7 foreclosure sale.

8 Under 11 U.S.C. 1112(b) (3), a hearing on a motion
9 to dismiss is to commence within 30 days after the filing of
10 the motion to dismiss unless the movant consents or
11 compelling circumstances prevent the court from meeting the
12 time limit. Thirty days is May 26th and there is an omnibus
13 hearing scheduled on that date. We believe it's the most
14 reasonable, efficient, and just course to hold a hearing on
15 the motion to dismiss on that day, consistent with the time
16 limits set forth in Section 1112. The relevant facts are
17 straightforward and should not be contested. Relatively
18 little, if any, discovery is necessary to decide the motion
19 to dismiss.

20 As Your Honor knows, bankruptcy confers many
21 benefits, privileges, and protections upon a debtor in order
22 to effectuate the greater societal goals of the bankruptcy
23 code, but those benefits come with responsibility too and
24 they should not be abused. And it is not too much to ask a
25 debtor to prove that it has a good faith basis for its filing

1 and to do so within 30 days of the motion to dismiss being
2 filed.

3 If Your Honor agrees with us that the motion to
4 dismiss should go forward on May 26th and that the stay
5 relief should be bifurcated, we would propose to meet and
6 confer with the debtor to come to a pre-hearing schedule
7 consistent with that ruling.

8 Thank you.

9 THE COURT: Thank you very much.

10 Ms. Fay?

11 MS. FAY: Good morning -- or good afternoon, Your
12 Honor, Erin Fay from Bayard on behalf of GVS. Your Honor,
13 we're here on a scheduling conference, but I think we've just
14 heard an argument on the motion to dismiss in general.

15 It has always been the debtor's position that
16 value is at the heart of this case and it believed that when
17 it filed. There are -- there is valuation evidence; however
18 that evidence, to the extent it's a formal appraisal, is
19 dated. The debtor believes the most efficient and the most
20 appropriate path is to kind of bring that forward to give
21 Your Honor the best evidence absent an actual sale process or
22 an actual indication of market value, but the best process is
23 to use experts. We have endeavored to bring that process as
24 quickly as possible through this court and we think that we
25 can get an expert to do a report status within four weeks,

1 and that we can effectuate discovery, both an expert and fact
2 discovery, in a relatively short and appropriate time period.

3 I understand that the secured lender believes
4 there is urgency here, but this is a contested matter under
5 9014 and the debtor has served discovery on RREF and three
6 third parties. RREF has likewise served discovery on the
7 debtor. It has served expansive discovery that,
8 unsurprisingly, goes to value.

9 Value is at issue without regard to bifurcation;
10 it is an issue in good faith and it is an issue in the lift-
11 stay portion. So bifurcation, in our view, does not -- it
12 does not help here, it also potentially is inefficient in the
13 sense that, if the motion is unsuccessful, we would be back
14 before Your Honor on similar issues and that is an
15 inefficient use of the process here.

16 In an attempt to reach an agreement, you know, the
17 process we have set forth, with Your Honor's calendar
18 permitting, would get us to trial at the end of June. That's
19 an additional four weeks to run through a process that
20 actually has procedural and substantive abilities for the
21 debtor to put forward its case. We would propose that the
22 fact discovery would be produced in a few weeks, followed by
23 depositions and fact witnesses. The debtor's expert report
24 would be provided on or about June 16th, followed by a
25 deposition, and then papers would be filed.

1 The whole matter, although expedited, would be
2 presented to Your Honor in a comprehensive and complete
3 package by the end of June.

4 The scheduled RREF demands would somehow take us
5 to trial in two weeks. This is not feasible; this is highly
6 prejudicial to the debtor. The debtor can only infer that
7 RREF intends to prevent the debtor from presenting an
8 organized and meaningful response to its motion and to the
9 fundamental question of whether this case will permit the
10 debtor to maximize value for all of its constituents.
11 Indeed, as we mentioned at the prior status conference, the
12 sponsor took years to accumulate this portfolio and put forth
13 tireless efforts to improve and manage it. RREF has owned
14 this piece of paper for two months and we are highly
15 skeptical of the process in which it came to own its paper.

16 All of these are fundamental facts that are
17 necessary to be investigated for the motion to dismiss. In
18 fact, RREF here bought the debt with full knowledge of the
19 circumstances of the debtor and we anticipate the evidence
20 will show that it bought with knowledge of the substantial
21 equity cushion that exists here.

22 In view of these facts, it is clear that this
23 dispute is not about a lender trying to collect on a debt,
24 but rather a competitor seeking to grab value in a rushed
25 process.

1 (Ringing)

2 THE COURT: Sorry, I'm going to have to confiscate
3 my own phone. I apologize.

4 MS. FAY: Your Honor, as we previously mentioned,
5 this whole (indiscernible) was performing prior to COVID.
6 Yes, there were impacts of COVID on this debtor. In that
7 context, there were initial proceedings in state court, those
8 -- in those proceedings, RREF's predecessor was found to have
9 put forth a commercially unreasonable process and a longer
10 process was put in place.

11 But at a critical moment, one day before the
12 scheduled auction, RREF, a competitor to the debtor who's
13 known to be highly aggressive, saw an opportunity. It
14 purchased the debt. It began to stifle any meaningful and
15 value-maximizing process that potentially could have resulted
16 in the state court foreclosure. And at that time, one day
17 before the auction, RREF revealed to the other auction
18 participants that it would be directing the sale. In the
19 debtor's view, this was just incredibly value-destructive and
20 unlikely to maximize value in that process, and given the
21 debtor's view of value it determined to file this case.

22 Now, the matter in New York and this matter before
23 this Court are different. The state court had predetermined
24 the foreclosure as the matter over which that court was
25 presiding. This Court is a court of equity, its mandate is

1 to give debtors a breathing spell to develop and implement
2 processes that best maximize value for all beneficiaries, and
3 that's what the debtor intends to do. GVS is in the process
4 of hiring professionals to implement a restructuring strategy
5 with an independent restructuring adviser. Mr. Tantleff from
6 FTI, the proposed CRO, is on the conference today.

7 Your Honor, we believe if we're able to take
8 evidence that the evidence will show that GVS filed this case
9 to maximize value and it remains committed to doing so.

10 So the substance of the dispute, however, Your
11 Honor, today is not before you, today is about scheduling.
12 As RREF counsel noted, we have met and conferred several
13 times. We have not come to an agreement as to the -- you
14 know, the final hearing date from which we work back some of
15 the other dates. It was a surprise to us that they last week
16 determined they would like to bifurcate the motion, but, as I
17 previously mentioned, we don't think that actually solves the
18 problem because valuation is critical across the board. And
19 that valuation testimony, including the expert testimony, the
20 fact discovery, will show that there were offers in the
21 market for this debtor and there were valuations by RREF's
22 predecessor that exceed debt stack by more than \$75 million,
23 which is not a small equity cushion, and at these amounts the
24 proposed foreclosure was nothing more than a forfeiture.

25 So GVS is presenting a process to this Court that

1 we think will resolve it and the best evidence that the Court
2 can have under an expedited time frame to make an appropriate
3 ruling on both the motion to dismiss and also the motion for
4 lift stay.

5 Thank you, Your Honor.

6 THE COURT: Well, thank you, but what about the
7 statute? It says 30 days absent compelling circumstances.

8 First of all, I have, I guess, a factual question.
9 Why is it taking four weeks to get a valuation? But if
10 that's the case, is that truly compelling circumstances,
11 especially since, again, at least some of the case law
12 suggests when I'm looking at the filing in good faith I'm
13 looking at it as of the petition date, not based on
14 information that was obtained by the debtor weeks, if not
15 months after filing.

16 MS. FAY: So, Your Honor, the motion to dismiss
17 was filed about two weeks ago we've spent some time,
18 obviously, with RREF working through what we thought was
19 going to be a longer process and we're talking to experts
20 along the way. Given, you know, the breakdown of those
21 discussions last week, there was maybe a little bit of a
22 pause on the experts, but we expect to have retention letters
23 today. The underlying exercise here in valuation requires
24 consideration of 62 properties across ten states, so it's not
25 a small endeavor and we think four weeks is a short but

1 appropriate amount of time to get that.

2 Again, the valuation, there were valuations done
3 prepetition and the debtor certainly considered those, and I
4 think RREF's declaration attached -- we don't actually know
5 how the evidence in that declaration -- what it relies upon,
6 there's a valuation number in their declaration, but we think
7 that it's most appropriate -- although of course the debtor
8 believes there was equity cushion and value as of the
9 petition date -- to have an actual snapshot of reality as it
10 sits today and that, given the importance of the issues here,
11 it is better to all of its constituents and to the case that
12 there are compelling circumstances here.

13 The statute certainly permits Your Honor to set a
14 schedule that's appropriate and we've laid out the reasons
15 why we think our schedule is appropriate and, given the
16 importance of the issues here, we believe they're compelling.

17 THE COURT: All right, thank you.

18 Ms. Richenderfer, do you have any comment?

19 MS. RICHENDERFER: Yes. Thank you, Your Honor.

20 The United States Trustee at this point in time has no
21 comment on the motion to dismiss or the proposed schedule;
22 however, we do have a concern, which is this. We are one
23 month into this case; there have been no retention
24 applications filed, the debtor has no bank accounts, and I
25 see no source of funding. And so I hear Ms. Fay go through a

1 list of professionals that are going to be hired, including a
2 CRO, and right now this debtor has no money. It doesn't have
3 a bank account, it doesn't have a loan, and the prepetition
4 retainers were paid for by the ultimate equity owner.

5 So, on paper, I do have a concern regarding this
6 matter moving forward without this debtor obtaining or at
7 least putting before the Court the type of financing it is
8 going to use to move forward as it goes through this process
9 of retaining professionals and putting them in place. I have
10 not heard that addressed -- not that that's an issue for the
11 motion to dismiss, but perhaps that just takes us back to the
12 reasons why the motion to dismiss was filed in the first
13 place, this is not an operating debtor.

14 So that's the concern that the U.S. Trustee's
15 Office has at this point in time.

16 THE COURT: Okay. Thank you.

17 Ms. Fay, would you like to address that?

18 MS. FAY: Your Honor, at this time the case
19 funding would have to come from the equity sponsor -- I mean,
20 RREF would have to be primed, which although that may touch
21 on issues that, you know, are relevant in the motion to
22 dismiss, it is not presently a DIP funding proposal.

23 THE COURT: Okay. All right. Well, no, we're
24 going to have -- we're going to follow the statute and we're
25 going to have a hearing. I haven't heard anything today

1 really that would rise to the level of compelling
2 circumstances. Certainly, it would be preferable, it usually
3 is, to have a more lengthy and organized process leading to a
4 contested evidentiary hearing, but we also do things in short
5 order in bankruptcy because we're compelled to by exigent
6 circumstances. And here I just don't see procedural niceties
7 of further discovery being sufficient to justify a finding of
8 compelling circumstances.

9 In addition, I am very concerned with what Ms.
10 Richenderfer has just said, the fact that there's no bank
11 account, the fact that there is no financing bill currently.
12 As Ms. Fay stated, it would have to be -- it would have to
13 prime the secured creditor, which of course would be
14 contested, and any further funding of this litigation will
15 have to come as a contribution by equity, I suppose, but you
16 can't -- you can't use -- you can't operate an estate being
17 paid by a non-debtor, that money has to flow through the
18 estate, I think -- I may be wrong there, but I think that's
19 the case -- in which case that way the Court can keep an eye
20 on what's being spent and what administrative expenses are
21 getting paid and to make sure they're appropriate.

22 So this is very, very unusual and I think speed
23 here, as (indiscernible) plain meaning of the statute,
24 clearly is more important than any desire to update
25 valuations that were previously done.

1 So we're going to have a hearing on May 26th. Let
2 me just look at my calendar here for this.

3 (Pause)

4 THE COURT: Which I think is the 30th day. It's a
5 busy day, but we will start at 10:00 a.m. We may have to
6 take some breaks to handle some other matters, none of which
7 are particularly pressing as far as I understand. So we'll
8 just go as long as we have to go in connection with that. So
9 please work out a schedule that works, but if it means you
10 can't get an appraiser in time for the hearing, you'll just
11 have to rely on other evidence.

12 You know, I would point out too, you were in
13 bankruptcy for several weeks before the motion to dismiss was
14 filed. So you didn't file anything, you haven't, you know,
15 filed any financing or retention, any kind of requests for
16 relief by the Court. So I don't think, especially given what
17 I heard from you, Ms. Fay, about how we got here, that it
18 should have been a surprise this was coming.

19 So, with all due respect, I'm going to force the
20 debtors to follow the statute and have a hearing on May 26th,
21 starting at 10:00 a.m., and the Court will issue its decision
22 within 15 days of commencement of the hearing, as required by
23 the statute.

24 Okay?

25 MS. FOUDY: Your Honor, one other issue that --

1 thank you, Your Honor -- we wanted to raise one other issue
2 that has arisen and that's -- we understand that currently
3 the underlying property owners are required to remit monthly
4 payments into a designated cash management account held by
5 the servicer, which is PNC Bank, and the servicer then
6 distributes those funds pursuant to a waterfall which results
7 in debt service payments to the secured lender and that's our
8 cash collateral. And in the debtor's initial monthly
9 operating report that was filed on April 26th, its cash flow
10 projections reflect the monthly waterfall payment going to
11 the secured lender, that's what it says in the monthly
12 operating report; however, the servicer will not release the
13 funds to the secured lender without an invoice, and we're
14 concerned -- we don't want, you know, sending an invoice to
15 the servicer to release those funds to be -- we're looking
16 for comfort that that would not be viewed as a violation of
17 the stay if we were to issue an invoice.

18 So I don't know if, you know, the debtor can
19 stipulate that they'll lift the stay to the extent it's
20 necessary to allow the servicer to pay us cash, but, you
21 know, their operating report did contemplate that the money
22 would come to us.

23 THE COURT: Well, first of all, the debtor can't
24 agree to lift the automatic stay, you need a court order. So
25 you would have to have a stipulation and order. And, if

1 they're not going to agree, you're going to have to move.
2 And I'm certainly not going to give you an oral comfort or a
3 limited information at a scheduling conference that says it's
4 okay to violate the automatic stay, if that is in fact what
5 would happen.

6 So I think -- you know, I leave it to Ms. Fay to
7 respond -- I don't think she needs to respond right now -- to
8 respond to you and, if you can't get an agreement, you'll
9 have to file some sort of paper with the Court. You know,
10 the automatic stay is obviously very important and lifting it
11 either by agreement or certainly on a contested basis has to
12 be litigated properly, and that's one where I don't have to
13 have a hearing -- well, I do have to have a hearing in 30
14 days, actually -- well, it depends on what kind of stay
15 relief it is.

16 But see if you can work it out with Ms. Fay and,
17 if not -- if so, you can submit a stipulated order to the
18 Court under certification of counsel and I'll approve it; if
19 not, you're going to have to institute some sort of process.

20 MS. FAY: Your Honor, can I ask for one
21 clarification?

22 THE COURT: I can't hear you for some reason. Is
23 that me?

24 MS. FAY: My microphone looks like it's working.

25 THE COURT: Okay, go ahead.

1 MS. FAY: Can you hear me now, Your Honor?

2 THE COURT: Ah, better, yes.

3 MS. FAY: Sorry about that, I'm not sure what
4 happened. One clarification, if you would, on what's going
5 forward on the 26th. Is it just the motion to dismiss --

6 THE COURT: Yes, yes.

7 MS. FAY: Thank you, Your Honor.

8 THE COURT: Okay? Anything else from anyone?

9 Okay. Thank you all very much. Have a good day.
10 We're adjourned.

11 COUNSEL: Thank you, Your Honor.

12 (Proceedings concluded at 12:28 p.m.)

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

6

7

8

9

May 15, 2021

10 | Tracey J. Williams, CET-914

May 13, 2021

11 | Certified Court Transcription

12 || For Reliable

1.0

1

22

23

24

23